80-112

Supreme Court U.S.
FILED
JUN 27 1980
MICHAEL RODAK, JR., CLERK

IN THE UNITED STATES SUPREME COURT

ALLAN R. McKNIGHT,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TOWEY & ZAK

By: _____
Edward B. Towey
Attorneys for
Petitioner
1701 West 72nd Ave.
Suite 210
Denver, Colorado 80221
(303) 428-7411

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Opinion
Petition for Rehearing
Order Denying Petition for Rehearing

I. OPINION OF WHICH REVIEW IS SOUGHT.

The opinion of which review is sought is Allan R. McKnight v. The People of the State of Colorado, _____Colo._____P.2d _____(May 1980 Colorado Lawyer page 1052, No. C-1780, March 17, 1980). A copy of the said opinion is appended hereto.

II. GROUNDS OF JURISDICTION.

A. The judgment for which review is sought was entered on March 17, 1980.

B. On April 7, 1980, the Petitioner's timely Motion for Rehearing was denied by the Colorado Supreme Court.

C. It is believed that this Court has jurisdiction to review the judgment by virtue of 28 U.S.C. §1257.

III. QUESTION PRESENTED FOR REVIEW.

Is a sentence of incarceration for embezzlement of public funds violative of the Eighth Amendment proscription of cruel

and unusual punishment when the undisputed evidence is that incarceration will, in all probability, cause the convict's death?

IV. CONSTITUTIONAL PROVISION WHICH IS INVOLVED IN THIS CASE.

U.S. CONST. AMENDMENT VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

V. STATEMENT OF THE CASE.

On January 22, 1976, the Petitioner was convicted of embezzlement of public property. At the sentencing hearing on January 27, 1976, Chief Probation Officer Charles Erickson submitted his pre-sentence report which noted the Petitioner's physical and mental health problems. The report noted that the Petitioner suffers from high blood pressure, chronic diarrhea, and hypoglycemia. He formerly

had an alcohol problem. The pre-sentence report noted the Petitioner suffered from extreme depression and anxiety. It also reflected his Army discharge on the basis of emotional instability.

Officer Erickson concluded the report by stating as follows:

> [A]vailable information about Mr. Mcknight's physical and mental health creates a substantial doubt as to whether he is capable of serving time. I am therefore recommending that, if the Court considers ordering a period of incarceration, independent physical and psychiatric diagnosis should first be ordered to determine the probable effect of incarceration upon this individual. If it is then considered feasible for time to be served, the defendant should be placed in a penal institution or mental facility

> where adequate resources exist for his proper care. I view Mr. McKnight's offenses as being very serious and would therefore normally flatly recommend some jail or prison time. However, he should not be made to suffer cruel and unusual punishment because of his apparent serious physical and emotional ailments. If probation is granted, it should be for a lengthy period of time. As noted, the defendant is prepared to make restitution. (emphasis added).

After receiving more medical information, Officer Erickson filed an addendum to the pre-sentence report which stated, "[T]he offenses were of an aggravated nature, but I do believe that the defendant is presently physically and emotionally incapable of serving time in jail or prison."

There was also testimony from the Petitioner's psychiatrist that the Petitioner had a long history of psychiatric problems, including severe depression and suicidal ten-

dencies. He had formerly been treated with electroshock and was then being treated with large amounts of medication. The psychiatrist stated that incarceration would be a grave health risk and that it would, in fact, be life threatening, physically and mentally.

The prosecution presented neither evidence nor argument and took no position with regard to the sentencing. Despite the evidence, the Petitioner was sentenced to an indeterminate sentence in the state reformatory not to exceed three and one-half years.

Subsequent to an appeal, the trial court held a further hearing on September 2, 1977 on the Petitioner's Motion to Amend the Sentence to determine if the Petitioner's health condition had further deteriorated. The Petitioner's psychiatrist submitted his report that the Petitioner's

condition had deteriorated since the previous hearing. A cardiologist testified that incarceration would almost be the death of the Petitioner. And the court-appointed forensic psychiatrist submitted his finding that the Petitioner would be a high risk inmate. The prosecution presented neither evidence nor argument regarding the sentence.

Despite the undisputed evidence that incarceration could very likely cause the Petitioner to die, the trial court did not amend its sentence. The decision was affirmed by the Colorado Court of Appeals on appeal and by the Colorado Supreme Court on a writ of certiorari.

The issue of the cruel and unusual nature of incarceration in light of the Petitioner's health conditions was raised at both sentencing hearings before

the trial court (f. 161 and f. 224). It was also raised before the Colorado Court of Appeals and Colorado Supreme Court (pages 4 and 13 of the Petitioner's opening briefs respectively).

VI. ARGUMENT.

The only evidence presented to the trial court was that the Petitioner was a person who was likely to die if incarcerated. Despite the evidence of the Petitioner's health condition, the court ordered the Petitioner's incarceration. It is respectfully submitted that the Colorado Supreme Court's judgment affirming the sentence contravenes the Eighth Amendment proscription of cruel and unusual punishment, as made applicable to the states by the Fourteenth Amendment, and is probably in conflict with the opinion rendered by this Court in Estelle v. Gamble, 429 U.S. 97 (1976).

In Estelle v. Gamble, supra, this Court stated that the Eighth Amendment mandates that penal measures must be measured against broad and idealistic standards of humanity, dignity, and decency. For this reason, it was stated, the government must make provision for a convict's medical care. A failure to satisfy the convict's medical needs "may actually produce physical 'torture or a lingering death,' the evils of most immediate concern to the drafters of the (Eighth) Amendment." (citation omitted, parenthetical added.) 429 U.S. at 103. This Court then concluded that deliberate indifference to the medical needs of a prisoner is proscribed by the Eighth Amendment.

The judgment rendered by the Colorado Supreme Court reflects a deliberate indifference to the particular health needs of the Petitioner in violation of the

Eighth Amendment as interpreted in Estelle v. Gamble, supra. It is for that reason that this Court should review that judgment on certiorari.

TOWEY & ZAK

By: _____
Edward B. Towey #2403
1701 West 72nd Avenue
Suite 210
Denver, Colorado 80221
Telephone: 428-7411

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true copy of the foregoing Petition For Writ of Certiorari to J.D. MacFarlane attention, Sarah Scott Sammons at 1525 Sherman Street, Third Floor, Denver, Colorado 80202, via United States Mail, postage prepaid, this _____ day of _____, 1980.

_____
Secretary

IN THE SUPREME COURT OF COLORADO

NO. C - 1780

ALLAN R. McKNIGHT,	)
	)
Petitioner,	)
	)
v.	)
	)
THE PEOPLE OF THE STATE OF COLORADO,	)
	)
Respondent.	)

Certiorari to the Colorado Court of Appeals

EN BANC CAUSE REMANDED

Towey & Zak
William S. Silverman
Edward B. Towey

Attorneys for Petitioner.

J.D. MacFarlane, Attorney General,
Richard F. Hennessey, Deputy Attorney General,
Edward G. Donova, Solicitor General,
Sarah Scott Sammons, Assistant Attorney General,

Attorneys for Respondent.

CHIEF JUSTICE HODGES delivered the Opinion of the Court.

APPENDIX

Petitioner McKnight was convicted of embezzlement of public funds. He appealed, and the Colorado Court of Appeals affirmed his conviction in People v. McKnight, 39 Colo. App. 280, 567 P.2d 811 (1977).

Following this affirmance, the petitioner filed a Crim.P. 35(a) motion to reduce the sentence imposed on the ground that he had medical and psychological problems which would endanger his life if he were imprisoned. The trial court denied the motion after a full hearing. The petitioner then appealed the denial of the 35(a) motion, and the court of appeals affirmed in People v. McKnight, _____Colo._____, 588 P. 2d 886 (1978). We granted certiorari to review the issues presented and to clarify the law regarding the jurisidction of the court of appeals when a defendant seeks to appeal a denial of a 35(a) motion.

As to the jurisdictional issue, People v. Malacara, _____Colo._____, P.2d_____(1980) (Supreme Court No. 79SA31, announced February 25, 1980), extensively discusses and resolves it. In accordance with Malacara, supra, the court of appeals correctly held that when the issue presented by the 35(a) motion concerns propriety of sentence, it is not appealable.

The petitioner also contends that the sentence as imposed upon him, although within the statutory limitations, amounts to cruel and unusual punishment as to him and would therefore be unconstitutional if inflicted. The petitioner thus attempts to raise the propriety of sentence issue to one of constitutional magnitude. Nevertheless, it is still a challenge to the propriety of his sentence, and this type of challenge is not reviewable on appeal from a denial of a Crim. P. 35(a) motion to

reduce a sentence.[1] Malacara, supra.

We are, however, cognizant of the fact that the basis for the cruel and unusual punishment challaenge here arose after the initial sentence was imposed. But, a defendant's health condition is not generally a basis for a constitutional challenge of this type. See generally Coker v. Georgia, 433 U.S. 587, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 857 (1976). The appropriate

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1 Obviously, had the petitioner sought relief by means of a Crim. P. 35(b) motion alleging and attempting to show that his sentence was imposed in violation of the United States of Colorado Constitutions, he would have a right to appeal a denial of that motion by virtue of Crim.P. 35(b)(2). See People v. Fulmer, 185 Colo. 366, 524 P.2d 606 (1974) ("It is well-settled that if a sentence is imposed within the statutory limits, and if it does not shock the conscience of the Court, it will not be disturbed by a reviewing court on the grounds that it constitutes cruel and unusual punishment.")

remedy available to the petitioner lies in the commutation power of the governor. Colo. Const. Art. IV, Sec. 7.

The court of appeals should have dismissed the appeal rather than address the merits of the defendant's purported cruel and unusual punishment claim. Malacara, supra.

The cause is remanded to the court of appeals for the entry of an order dismissing the appeal.

JUSTICE LEE does not participate.

IN THE SUPREME COURT

OF THE STATE OF COLORADO

NO. C-1780

ALLAN R. McKNIGHT, Petitioner, vs. THE PEOPLE OF THE STATE OF COLORADO, Respondent.	)	CERTIORARI TO COLORADO COURT OF APPEALS

PETITION FOR REHEARING

OPINION WRITTEN BY CHIEF JUSTICE HODGES

ON APPEAL FROM THE GARFIELD COUNTY DISTRICT COURT

THE HONORABLE GARVIN D. LITWILER, JUDGE

TOWEY & ZAK

By /s/ William S. Silverman
William S. Silverman #9184
Attorneys for Petitioner
1701 West 72nd Avenue
Suite 210 - Manor Building
Denver, Colorado 80221
Telephone: 428-7411

COMES NOW Alan R. McKnight, the petitioner, by and through its attorneys, Towey & Zak, and respectfully petitions this Court for a rehearing in the within matter. As grounds for rehearing he states as follows:

The Court failed to apply or consider the application of its powers and duties under its constitutional supervisory power. Being of constitutional origin, that power supercedes the legislative prohibition of sentence review upon which this Court's opinion was based. That constitutional power is to be exercised, as it was in Spann v. People, 561 P.2d 1263 (1977), in a case in which a trial court has imposed a grossly unfair sentence. The instant case is just such a case. The opinion and judgment rendered by the Court fails to consider either the Court's constitutional supervisory power or the precedent of Spann.

Furthermore, it has been held by

the United States Supreme Court that indifference to a prisoner's health needs is violative of the Eighth Amendment to the United States Constitution, Estelle v. Gamble, 429 U.S. 97 (1976). Since the incarceration of McKnight would, according to the uncontradicted evidence presented at the sentencing hearing, be life threatening, his incarceration would be cruel and unusual punishment in violation of the Eighth Amendment and Colorado Constitution Article II, Section 3.

TOWEY & ZAK

By /s/ William S. Silverman

William S. Silverman #9184
1701 West 72nd Ave. #210
Denver, Colorado 80221
Telephone: 428-7411

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true copy of the foregoing to J.D. MacFarlane, Attorney General, 1525 Sherman Street, 3rd Floor, Denver, Colorado, via United States Mail, postage prepaid, this 31st day of March, 1980.

/s/ Lela Darnell
Secretary

IN THE SUPREME COURT OF THE STATE
OF COLORADO

ALLAN R. McKNIGHT,	)
	)
Petitioner,	)
	)
C-1780 vs.	)Certiorari to the
	)Court of Appeals
THE PEOPLE OF THE STATE OF COLORADO,	)
	)
	)
Respondent.	)

Upon consideration of the Petition For Rehearing filed by the Petitioner in the above cause, and now being sufficiently advised in the premises,

It is This Day Ordered that said Petition be, and the same hereby is, Denied.

BY THE COURT, EN BANC, APRIL 7, 1980.

cc: TOWEY & ZAK
William S. Silverman, Esq.
1701 West 72nd Avenue
Suite 210 - Manor Building
Denver, Colorado 80221

Sarah Scott Sammons
Assistant Attorney General
1525 Sherman Street, Third Floor
Denver, Colorado 80202

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

NO. 80-112

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ALLAN R. McKNIGHT

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION

J.D. MacFARLANE
Attorney General

RICHARD F. HENNESSEY
Deputy Attorney General

MARY J. MULLARKEY
Solicitor General

J. STEPHEN PHILLIPS
First Assistant Attorney General
Litigation Section

SARAH SCOTT SAMMONS
Assistant Attorney General
Litigation Section

Attorneys for Respondent

1525 Sherman Street, 3rd Floor
Denver, Colorado 80203
Telephone: (303) 839-3611

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ALLAN R. McKNIGHT	)	
	)	
Petitioner,	)	On Petition for
	)	Writ of Certiorari
v.	)	to the Supreme Court
	)	of the
THE PEOPLE OF THE	)	State of Colorado
STATE OF COLORADO,	)	
	)	
Respondent.	)	

BRIEF IN OPPOSITION

INTRODUCTORY STATEMENT

The respondent accepts the petitioner's statement as to jurisdiction and the petitioner's list of the consitutional provisions involved. However, the factual context of this case requires a restatement of the issue presented.

QUESTION PRESENTED

Does the discretionary decision of a trial court to sentence a felon to the minimum term of incarceration, rather than to grant probation, violate the Eight Amendment proscription of cruel and unusual punishment?

STATEMENT OF THE CASE

Allan McKnight, formerly a county commissioner for Adams County, Colorado, was convicted of five counts of

embezzlement of public property. Before the court imposed sentence, a presentence report noted the petitioner had high blood pressure, chronic diarrhea, and hypoglycemia. The report also indicated McKnight had been discharged from the army on the basis of emotional instability, and that he continued to have emotional problems.

At the sentencing hearing Dr. David Rice, the petitioner's psychiatrist, testified that it was hard to predict the effect a penitentiary sentence would have on the man. He indicated McKnight had cut his wrists when he was fifteen and had "seriously threatened" suicide several different times. He concluded that incarceration would be "a grave health risk," as the petitioner would see suicide as "a way out" of prison, but said he did not really believe incarceration would be life threatening.

The court sentenced McKnight to an indeterminate term not to exceed three and one-half years, the minimum sentence of incarceration for a class 4 felony under the statutes in effect at the time. Colo. Rev. Stat. 1973, section 16-11-101(1)(b) (1978 repl. vol.); Colo. Rev. Stat. 1973, section 18-1-105(1) (1978 repl. vol.). The trial judge stated he thought adequate provision could be made for the petitioner's health. The court further ordered that physical and mental examinations should be given if the petitioner's conviction were affirmed on appeal.

After the affirmance of the petitioner's conviction by the Colorado Court of Appeals, he moved for a reconsideration of his sentence in the trial court. At the Colo. R. Crim. P. 35(a) hearing, the court received into evidence a letter from Dr. Rice, a psychiatric evaluation from the court appointed forensic psychiatrist, Dr. Edmund Casper, and testimony from Dr. John Thomas Norton, a cardiologist.

Rice indicated the petitioner's condition had deteriorated. He said McKnight was "absolutely unpredictable" and that suicide was "imminently possible." Casper indicated that there was no way to predict the effect incarcera-

tion would have on McKnight, but stated McKnight would be a "high risk" inmate, "as he has been a high-risk psychiatric patient throughout his life from the age of thirteen or fourteen." Casper also indicated that a definite decision as to whether the petitioner would be going to prison would "no doubt" relieve some of his anxiety. Norton predicted the petitioner's suicidal tendencies would cause his death. However, his prognosis was based on the assumption that the petitioner would go to Pueblo — the Colorado State Hospital.

The trial court refused to reconsider or reduce the petitioner's sentence. Its decision was appealed to the Colorado Court of Appeals and to the Colorado Supreme Court. The Colorado Supreme Court held that the propriety of the petitioner's sentence was not appealable and remanded the case to the court of appeals with orders to dismiss the appeal.

ARGUMENT

THE TRIAL COURT'S DISCRETIONARY DECISION TO SENTENCE THE PETITIONER TO THE MINIMUM TERM OF INCARCERATION DID NOT CONSTITUTE AN INFLICTION OF CRUEL AND UNUSUAL PUNISHMENT.

No challenge to the petitioner's sentence was raised in his substantive appeal to the Colorado Court of Appeals. The posture in which this case reached the Colorado appellate courts was as an appeal from the trial court's refusal to reconsider the sentence under a Colo. R. Crim. P. 35(a) motion. At the time this case arose the purpose of a Colo. R. Crim. P. 35(a) proceeding was to allow the trial judge to reduce an excessive sentence or to correct an illegal sentence. The proceeding was never intended to be a forum for raising claims of constitutional violations. *See People v. Guitron*, 191 Colo. 284, 552 P.2d 304 (1976). The petitioner's allegation of cruel and unusual punishment should have been raised in a Colo. R. Crim. P. 35(b) motion.

Assuming for argument that the issue of cruel and unusual punishment is properly before this court, the petitioner's allegation finds no support. A well-considered sentence to the minimum term of incarceration did not violate the Eighth Amendment rights of the petitioner.

The issue presented to and rejected by the Colorado appellate courts was whether the trial court had abused its discretion in sentencing an undeniably ill man to the minimum term of imprisonment. This court has held that appellate review of sentence is at an end once it is determined that the sentence is within the limits set forth in the statute. *Dorzynski v. United States*, 418 U.S. 424 (1974). Furthermore, a sentencing judge is afforded wide discretion in determining the appropriateness of the punishment imposed. *Williams v. Illinois*, 399 U.S. 235, 243 (1970).

As the petitioner here was sentenced to the minimum period of incarceration, his attack on his sentence constitutes an attack on the court's refusal to grant probation. The Colorado Supreme Court has determined that probation is a privilege, not a right, *Holdren v. People*, 168 Colo. 474, 452 P.2d 28 (1969), and the Fifth Circuit Court of Appeals has held the imposition of a sentence to incarceration, rather than probation, does not constitute cruel and unusual punishment. *United States v. Frick*, 490 F.2d 666 (5th Cir. 1973) *cert. denied sub nom. Peterson v. United States*, 419 U.S. 831 (1974).

Although a claim of cruel and unusual punishment constitutes an attack on the substance of one's punishment, the petitioner's position that probation should have been granted merely attacks the form of his punishment. When the form of punishment is assailed, a two-step inquiry must be conducted under *Gregg v. Georgia*, 428 U.S. 153 (1976), as explained in *Coker v. Georgia*, 433 U.S. 584 (1977). The punishment offends the Constitution if it involves purposeless and needless imposition of pain and suffering or if it is grossly out of proportion to the severity of the crime.

While currently evolving standards of decency could not condone the imposition of the death sentence for embezzlement, *see e.g., Coker v. Georgia,* 433 U.S. 584, 598-599 (1977), the petitioner was not given the equivalent of a death sentence. Both psychiatrists indicated McKnight's reaction to incarceration was unpredictable, and that he had been suicidal since he was quite young and would continue to be potentially suicidal in prison. Dr. Norton indicated the petitioner would kill himself if he were sentenced to the state hospital. None of the predictions of death was based on conditions at the Colorado State Reformatory or the Colorado State Penitentiary.

The trial court stated it thought adequate provision could be made for the petitioner's condition. There was no evidence presented that the petitioner would not receive physical and mental health care. His reliance on *Estelle v. Gamble,* 429 U.S. 97 (1976), in support of his claim is misplaced. Even if this court were to extend the rationale of *Estelle* beyond the prison context and into an examination of a sentencing judge's conduct, McKnight could not fit himself within the guidelines established in *Estelle.*

It is only "deliberate indifference" by the state to "serious medical needs" of a person under its control which offends the eighth amendment. No deliberate indifference by the trial court has been revealed. In fact, a great deal of evidence as to the petitioner's health condition was taken and considered by the trial court before the imposition of sentence and before the court refused to reconsider sentence. The record of the proceedings was before both the Colorado Court of Appeals and the Colorado Supreme Court.

The refusal to grant probation after a thorough review of the defendant's history and medical needs has been determined not to constitute cruel and unusual punishment. *See United States v. Gamboa,* 543 F.2d 545 (5th Cir. 1976); *cf. United States v. Hayes,* 589 F.2d 811 (5th Cir.) *cert denied,* ____ U.S. ____ , 100 S.Ct. 93 (1979). (No Eighth Amendment violation when sentencing judge considered presentence reports, special medical reports, and defendant's background).

Any implication that prison officials will not care for the needs of the petitioner are premature. No deliberate indifference to the petitioner's serious medical needs can be shown until prison officials have had a chance to act on those needs.

The sentence imposed here fails to "shock the conscience" or to offend "evolving standards of decency." Although the petitioner has demonstrated he has medical needs, there has been no indication of "deliberate indifference" on the part of the State to those needs. In fact, the only indication of an indifference to the petitioner's welfare is the indication that he himself may take his life whether he is in or out of prison.

CONCLUSION

As there is no indication the petitioner has been cruelly and unusually punished, it is urged that certiorari be denied.

Respectfully submitted,

J. D. MacFARLANE
Attorney General

RICHARD F. HENNESSEY
Deputy Attorney General

MARY J. MULLARKEY
Solicitor General

J. STEPHEN PHILLIPS
First Assistant Attorney General
Litigation Section
A member of the Bar of this Court

SARAH SCOTT SAMMONS
Assistant Attorney General
Litigation Section
Not a member of the Bar of this Court

Attorneys for Respondent

1525 Sherman Street, 3rd Floor
Denver, Colorado 80203
Telephone: 839-3611
AG Alpha No. DA QQ GCEF
AG File No. DLI/McKNigh/1LA

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within BRIEF IN OPPOSITION upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this ____ day of July 1980, addressed as follows:

Edward B. Towey
1701 West 72nd Ave., Suite 210
Denver, CO 80221

Attorney for Petitioner

AG File No. ALI/McKNIGHT/C